

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JERMAINE K. HARDY,

Defendant-Appellant.

UNPUBLISHED

November 13, 2003

No. 242199

Wayne Circuit Court

LC No. 01-004327

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ISIAH HARDY,

Defendant-Appellant.

No. 242201

Wayne Circuit Court

LC No. 01-004327

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

In this consolidated appeal, defendant Jermaine Hardy appeals as of right his jury trial convictions for assault with intent to commit murder, MCL 750.83, two counts of assault with intent to rob and steal while armed, MCL 750.89, possession of a firearm by a person convicted of a felony, MCL 750.224f, and felony-firearm, MCL 750.227b. Isaiah Hardy, who waived his right to trial by jury appeals as of right his bench trial conviction for two counts of assault with intent to rob and steal while unarmed, MCL 750.88. Defendant Jermaine Hardy was sentenced to concurrent sentences of 38 to 80 years imprisonment for the assault with intent to commit murder conviction, 38 to 80 years for the two assault with intent to rob and steal while armed convictions, 1 to 5 years for possession of a firearm by a person convicted of a felony conviction, and a 2 year consecutive sentence for felony-firearm conviction. Defendant Isaiah Hardy was sentenced to concurrent 5 to 15 year terms of incarceration for his convictions.

Defendant Jermaine Hardy claims entitlement to a new trial because of a disclosure to the jury during voir dire of a prior armed robbery conviction, ineffective assistance of counsel for failure to request a mistrial after the prior felony disclosure, and prosecutorial misconduct in

vouching for witnesses. He also claims his conviction for assault with intent to murder should be dismissed due to insufficient evidence. And, he requests that we either remand the case for entry of judgment of conviction for attempted armed robbery rather than the conviction of the two counts of assault with the intent to rob while armed for failure of the court to instruct the jury on the lesser and included attempt charges, or for retrial on the lesser attempt charges. Because the felony disclosure during voir dire was minimal followed by an immediate curative instruction and acquiescence by the jury on the question of their ability to follow the curative instruction, effective assistance of counsel, permissive prosecutorial comment, sufficient evidence on the assault charge for submission to the jury, and failure of evidence to support the lesser and included offense of attempted armed robbery, we affirm.

Defendant Isaiah Hardy claims that because of insufficient evidence the trial court erred when it convicted him of two counts of assault with intent to rob and steal while unarmed. Defendant further claims that the court erred when it allowed the prosecution to argue a prior record variable scoring error at defendant's requested resentencing hearing, regardless of claimed offense variable scoring errors, so as to negate a change in sentencing guidelines. There was sufficient evidence upon which the trial court convicted beyond a reasonable doubt, and because the trial court is obligated to ensure an accurate sentence, the court is to consider all possible errors in defendant's sentencing calculation. We affirm.

STATEMENT OF FACTS

Defendants are brothers who were tried together along with their brother Terrell Hardy. Jermaine Hardy decided to have his guilt decided by a jury. Isaiah and Terrell Hardy elected to have the court render their verdicts in a jury waiver trial. Defendants Jermaine and Terrell Hardy attempted to rob a liquor store and Isaiah Hardy drove the get-away car. Terrell Hardy has not appealed his convictions.

On March 9, 2001, Ida Wray, Linda Williamson and Steve Sheker had just begun their day, opening the Party Center liquor store located in Detroit, when two men, later identified as Jermaine and Terrell Hardy, entered the store and declared "this is a stick-up." Wray testified that the taller individual, later identified as defendant Jermaine Hardy, wore a mask and carried a silver handgun while Terrell Hardy carried a book bag. After the pair made their way to the back of the store, Wray jumped the counter and fled the store. She testified to seeing a red or burgundy car running outside the store that sped off after she ran from the store.

Meanwhile, Sheker watched from his vantage point in the store's kitchen as the two men ran toward the back of the store. He testified that he observed Jermaine Hardy fire the handgun toward Williamson, who was working behind the lottery counter near the store's office. According to Sheker, the bullet went into the wall "right behind her." Williamson testified that a person ran toward the office, a gun was fired towards the office, and the gun was pointed at her. She testified that she then went into the bulletproof office, turned off the light, and then, "hit the floor." Williamson testified that person "stuck his hand, with that gun, under my check cashing bin and fired another round."

After defendant fired the second shot at Williamson, Sheker grabbed a shotgun hidden behind the counter and ordered defendants to leave. When Jermaine Hardy came out from behind a cooler, pointing the gun at him, Sheker shot him. A struggle ensued between Sheker

and both defendants as they tried to wrestle the shotgun from his hands. Sheker testified that during the struggle, the mask of the armed man came off and he was able to see his face. At trial, Sheker identified defendant Jermaine Hardy as the gun-toting robber and defendant Terrell Hardy as his book bag-carrying partner. When Sheker regained control of the shotgun, defendants fled the store.

Just as defendants fled the store, Valerie Robinson pulled into the store's parking lot to visit her friend, Ida Wray. Robinson observed two individuals flee the store and get into a red Mercury Cougar driven by a third person.

Thomas Lagocki, a security officer at St. John's Hospital in Detroit, testified that on the morning of the robbery, a red Mercury Cougar carrying three men pulled up to the hospital's emergency center, dropped off defendant Jermaine Hardy and sped away. Officer Lindsay interviewed Jermaine Hardy. Lindsey testified that defendant identified himself as "Jeremy Harley," denied knowledge of the robbery, and denied knowledge of his unknown attacker.

Defendant Isaiah Hardy was also apprehended on the day of the robbery. Detroit Police officer Pierre Green testified that he had spotted the red Mercury Cougar and followed it to a gas station where Hardy was arrested. Following his arrest, Isaiah Hardy provided a written statement acknowledging that he had driven his mother's red Mercury Cougar to the hospital because his brother Jermaine had been shot.

During Isaiah Hardy's waiver trial segment, Officer Parra testified that Hardy denied any knowledge of the robbery of the liquor store, however, in a second statement he confessed to driving his brothers to the liquor store so they could rob it. Officer Parra testified that Hardy described how he had waited for his brothers while they were in the store and how he had heard two smaller gunshots, then one big shot.

The only witness called by the defense was defendant Jermaine Hardy. He testified that only he and his brother Terrell drove to the Party Center party store to purchase lottery tickets. Defendant testified that he and his brother immediately went to the back of the store toward the lottery machine, and he was holding only his car keys in his hand. Williamson inexplicably began screaming when he appeared in front of the lottery counter and that the moment he turned around he was shot by Sheker. Defendant denied ever possessing the handgun introduced into evidence, intending to rob the store, and giving a false name to Officer Lindsay at the hospital.

PROCEDURAL HISTORY

Before trial began and prior to voir dire, defendant Jermaine Hardy's attorney requested the court instruct the jury that, if evidence of defendant's prior felony conviction was brought up during trial, the jury could not use the information to determine whether the prosecution met its burden of proof and that the prior conviction is not an element of any of the other offenses except count four, possession of a firearm by a felon. The trial court agreed. During voir dire, the trial judge attempted to introduce the issue of the limited use of a prior conviction and inadvertently disclosed to the jury venire, "he has been convicted of robbery armed." A bench conference immediately followed the untoward statement. The court then gave a curative instruction admonishing the jury to disregard the statement, and instructing the jury of the limited use of a prior felony conviction. The trial court then made a separate inquiry of the jury, stating "is there

anybody who thinks that they cannot follow that instruction?" The jury assented. The trial court properly instructed the jury at the end of the trial.

Defendant Isaiah Hardy's appellate attorney filed a motion for resentencing and argued at a resentencing hearing that the offense variable total should have been scored at 55 instead of 130, and that the change in scoring lowered his sentencing guideline range from 36 to 71 months' to 29 to 57 months' imprisonment. If correct, defendant would have been sentenced outside of the guidelines because he was sentenced to 5 to 15 years' in prison. The trial court scheduled another hearing stating, "so that both parties could indicate your point of view as far as why he should receive what you feel he should receive." The trial court indicated that only after it had heard both parties' arguments regarding the correct sentencing guideline range would it resentence defendant.

But at the resentencing hearing, the prosecutor advised the court that a mistake had been made regarding prior record variable, PRV 7. The prosecutor argued that if the alleged scoring errors of the offense variables were correct, an argued concession, then the correct scoring of PRV 7 essentially rendered defendant's resentencing motion moot. The trial court agreed and resentedenced defendant Isaiah Hardy under the 36 to 71 month sentencing guideline to concurrent terms of 5 to 15 years' imprisonment.

ANALYSIS

Jermaine K. Hardy

I

Defendant Jermaine Hardy raises five issues on appeal, three by appellate counsel and two by standard 11 brief. His first issue concerns the inadvertent mentioning of his prior armed robbery conviction during voir dire. While counsel objected at a sidebar conference, resulting in a curative instruction and separate inquiry to the jury, defendant claims the remark was too prejudicial to the defendant on the charge of assault with intent to rob and steal while armed to have confidence in the guilty verdict. By standard 11 brief, defendant asserts counsel was ineffective for not pursuing a mistrial.

Even though an objection is made, if a defendant allows the trial to proceed without making a motion for mistrial following alleged prejudicial conduct, this Court reviews the matter for plain error. *People v Nash*, 244 Mich App 93, 96-97; 625 NW2d 87 (2000). Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

Although the prior conviction was an element of the crime of felon in possession of a firearm, defendant is correct in his argument that the trial court erred by inadvertently mentioning that defendant's prior conviction was for armed robbery. *Old Chief v United States*, 519 US 172, 185; 117 S Ct 644; 136 L Ed 2d 574 (1997). This Court must still determine whether that error affected the outcome of this case. *Carines*, *supra*, 460 Mich 763.

Three workers at the Party Center witnessed two individuals walk into the store and declare a robbery. Sheker, the store clerk, identified defendant Jermaine Hardy as the individual

he shot and the same person who fired shots at Williamson. There was extensive circumstantial and direct evidence from five different witnesses demonstrating defendants' commission of the crimes. Finally, there was the signed statement from Isaiah Hardy admitting that he drove Jermaine and Terrell Hardy to the liquor store in the red Mercury Cougar so they could rob it.

The trial court gave adequate curative instructions to the jury to cure any possible prejudice. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 277 (2001). Immediately following the remark about defendant's prior armed robbery conviction the court struck its remark from the record. The court also instructed the jury that any evidence of a prior conviction against defendant was not to be used against him. Moreover, the trial court obtained the assent of the jurors to specifically follow the limiting instruction and correctly instructed the jury with another limiting instruction before deliberations. Based on the curative instructions given by the trial court, it is clear that the trial judge took the necessary steps to cure any prejudice that may have resulted from its comment during voir dire. The record evidence of guilt is overwhelming and negates a reversal on the basis of actual innocence or serious affect on the fairness, integrity, or public reputation of judicial proceedings.

II

Defendant's standard 11 claim of ineffective assistance of counsel for allowing the case to go forward rather than a request for mistrial fails. This Court reviews de novo questions of constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In order to establish ineffective assistance of counsel, generally a defendant must show that trial counsel's performance did not meet an objective standard of reasonableness, that such performance affected the outcome of the trial, and that an outcome so affected was unfair. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

The right to counsel that the United States and Michigan Constitutions guarantee, U.S. Const, Am VI; Const 1963, art 1, sec 20, is the right to effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). Effective assistance is presumed, and a defendant bears a heavy burden to prove to the contrary. *LeBlanc, supra*, 465 Mich 578.

Obtaining the curative instructions, admonishment of the jury, and the assent by the jury to follow the limiting instruction was a strategy of counsel in dealing with the jurors' perception of a defendant's admitted conviction of a faceless felony. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

III

The crime of assault with intent to murder is a specific intent crime. Defendant claims that it was apparent from the evidence that he only wanted to scare Linda Williamson and the record evidence was therefore, insufficient to convict beyond a reasonable doubt.

In evaluating a claim of insufficient evidence, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact would have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). This Court will not interfere with the jury's determination regarding the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 478 (1992), amended 441 Mich 1201 (1992). "The standard of review is deferential; a reviewing court is required to draw all

reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowak*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To establish the crime of assault with intent to commit murder the prosecution must prove the following elements: (1) an assault, (2) with the specific intent to kill, (3) which, if successful, would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). “The intent to kill may be proved by inference from any facts in evidence.” *Id.* And circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish the elements of assault with intent to murder. *Id.*; *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Credibility of the witnesses is a matter for the trier of fact to ascertain. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

Defendant argues that his second shot under the check cashing bin could not reach Linda Williamson as she was on the floor, concluding he lacked intent to murder. Defendant ignores the fact that the first shot was aimed directly at Williamson and the possibility of ricochet of the second shot. The claim that there was insufficient evidence to convict him of assault with intent to commit murder is without merit. Viewed in a light most favorable to the prosecution, the record evidence of repeated gun shots at Williamson was sufficient for a jury to find the requisite intent beyond a reasonable doubt.

IV

Defendant contends the jury should have been instructed as requested on the crime of attempted armed robbery because it is a necessarily lesser-included offense of assault with intent to rob and steal while armed. *People v Bryan*, 92 Mich App 208, 225; 284 NW2d 765 (1979). We review de novo the determination denying a requested jury instruction on a lesser included offense of a charged crime as a question of law. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

Defendant’s reliance upon *Bryan* is misplaced. Not only must the inferior crime be a necessarily included lesser offense of the charged greater offense, but, “meaning, all the elements of the lesser offense are included in the greater offense, *and* a rational view of the evidence would support such an instruction.” (Emphasis supplied.) *Mendoza, supra*, 468 Mich 533, citing, *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). While *Bryan* stated that attempted armed robbery is a necessarily lesser included offense of assault with intent to rob while armed, the Supreme Court in *People v Adams*, 416 Mich 53, 56-59; 330 NW2d 634 (1982) revisited the issue of an attempt as a cognate rather than a necessarily lesser included offense of a substantive crime. Our Supreme Court held that the crime of attempt is a cognate offense of the substantive crime. The *Adams* court stated,

[a] defendant’s request to instruct the jury that it may find the defendant guilty of the cognate offense of attempt to commit the charged offense or of one of the necessarily included offenses of the charged offense must therefore be granted only where there is evidence, or on jury view a lack of evidence, tending to establish the elements of the cognate offense of attempt. *Id.*, at 57.

The enunciated rule has since been followed by this Court in affirming the denial of a request for the attempt armed robbery instruction when the substantive charge is assault with intent to rob while armed. *People v Weatherspoon*, 171 Mich App 549, 555-556; 431 NW2d 75 (1988).

With respect to the charged offense of assault with intent to rob and steal while armed, defendant's theory was that he was an unarmed patron without intent to rob the store. It was not defendant's theory that a robbery was aborted. Defendant acknowledges that the store clerk was in fear, however, he claims she was mistaken. On the element of assault with force and violence, no rational view of the evidence would support a factual dispute. Defendant after announcing a robbery, fired two gun shots at a store clerk who scampered for safety and "hit the floor" between the shots. The testimony of the store clerks that defendants announced a robbery and their observation of a hand gun constitutes evidence, if found by the jury, establishes the elements of intent to rob and being armed. The evidence before the jury was that of a completed crime, not an aborted crime. The trial court correctly denied the requested jury instruction on attempted armed robbery.

V

Finally this defendant by standard 11 brief charges the prosecutor with witness vouching during summation and rebuttal. Defendant argues that the prosecutor denied defendant a fair trial and violated defendant's due process rights when he vouched for the credibility of witnesses. We disagree.

A defendant must object to preserve a claim of prosecutorial misconduct for appellate review. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Because defendant did not object at trial, this issue is unpreserved.

Generally, prosecutorial misconduct is a constitutional claim, that this Court reviews de novo. *People v Pfaffle*, 246 Mich App 282, 288; 631 NW2d 162 (2001). This Court reviews unpreserved claims of prosecutorial misconduct for plain error. To find plain error, this Court must find that error occurred, that such error was clear or obvious, and affected a defendant's substantial rights. *Schutte, supra*, 240 Mich App 720. Plain error warrants reversal only when it has resulted in the conviction of an innocent defendant, or when it has seriously affected the fairness, integrity, or public reputation of a judicial proceeding. *Id.*

The prosecutor's statements must be considered as a whole and evaluated in light of defense arguments and the relationship they bear on the evidence admitted at trial. *People v Farnsley*, 94 Mich App 34, 36, 287 NW2d 361 (1979). Further, no error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A prosecutor may not mischaracterize the evidence. *Id.* A prosecutor may not make a statement of fact to a jury unless it is supported by the evidence presented. *Schutte, supra*, 240 Mich App 721. A prosecutor is empowered to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *Id.*

"A prosecutor may not vouch for the credibility of a witness by implying that the prosecution has some special knowledge that the witness is testifying truthfully." *People v Rodriquez*, 251 Mich App 10, 31; 650 NW2d 96 (2002). Our review of the challenged

comments reveals that the prosecutor neither argued facts not in evidence, nor improperly vouched for the credibility of the witness. The prosecutor argued that the witness was worthy of belief based on the evidence and reasonable inferences drawn from the evidence. There is no reversible misconduct.

Isaiah Hardy

I

Defendant Isaiah Hardy claims the findings of aiding and abetting by the court in his bench trial are insufficient to support the two count conviction of assault with intent to rob and steal unarmed, notwithstanding his admission of participation in the robbery. Such a claim is without merit because viewing the evidence in a light most favorable to the prosecution, the record evidence demonstrates that defendant aided and abetted in the commission of the robbery by being the driver of the getaway car.

In evaluating a claim of insufficient evidence, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact would have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Izarraras-Placante*, 246 Mich App 490, 496-497; 633 NW2d 18 (2001). Aiding and abetting describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *Carines, supra*, 460 Mich at 757; *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991). “The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime.” *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). An aider and abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Carines, supra* at 758.

Without referencing the circumstantial evidence of record, defendant basically challenges the trial court's utilization of defendant's statements in finding guilt beyond a reasonable doubt. Defendant did not move to suppress his statements or object to officer Parra's testimony concerning defendant's statements. A claim of unreliability or involuntariness of a statement or confession is an unpreserved constitutional issue reviewed for plain error. *Carines, supra*, 460 Mich at 763. This Court gives ample deference to the trial court's use of a voluntary confession unless it was clearly erroneous to do so. *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000).

The trial court did not commit plain error in using the testimony of defendant's confession and statement to determine defendant's guilt beyond a reasonable doubt. The testimony of Officer Parra demonstrated that Isaiah Hardy's confession was voluntary. The fact

that Officer Parra wrote Isaiah Hardy's second and signed statement at Hardy's request is not dispositive of the challenges to the statement's reliability or its voluntariness. Personal amenities were provided to defendant at his interrogation. The substantive facts as contained in the challenged statement were consistent with other testimony and circumstantial evidence of record. By way of example, the statement contained the correct sequence of gun shots including the disparate sounds of the two guns utilized. Valerie Robinson testified that immediately following the incident at the liquor store, defendants got into a red Mercury Cougar driven by a third person. Isaiah Hardy was observed later that same day by Detroit Police Officer Pierre Green, driving the same red Mercury Cougar prior to arrest. And Thomas Lagocki, the security officer at St. John's Hospital, observed the red Cougar, carrying three passengers, pull up to the emergency unit and drop off a wounded Jermaine Hardy.

Finally, defendant claims that the court erred when it allowed the prosecution to argue a prior record variable scoring error at defendant's requested resentencing hearing, regardless of claimed offense variable scoring errors, so as to negate a change in sentencing guidelines. We disagree.

A trial court's calculation of a sentencing guidelines range is reviewed for an abuse of discretion and if the record evidence adequately supports a particular score. *People v McLaughlin*, ____ Mich App ____; ____NW2d____ (2003) (Docket No. 234433, issued 9/25/03) slip op p 14. "The court of appeals ... shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. MCL 769.34(10); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001).

On defendant's motion for resentencing, the trial court scheduled the matter for hearing and then rescheduled the hearing, "so that both parties could indicate your point of view as far as why he should receive what you feel he should receive" The trial court indicated that only after it had heard both parties arguments regarding the correct sentencing guideline range would it resentence defendant. The argument that the prosecution's participation in resentencing in the absence of its own motion is without merit because sentencing is uniquely a matter for the court.

The Michigan statutory sentencing guidelines apply to crimes occurring after January 1, 1999, and in particular to defendant's sentencing. MCL 777.1 *et seq.*; MCL 769.34(2). In accordance with legislative sentencing guidelines, a court must impose a sentence absent a departure, within the appropriate sentence range. MCL 769.34(2), *Hegwood, supra*, 465 Mich 438.

The Supreme Court noted in *People v Miles*, 454 Mich 90, 98; 599 NW2d 299 (1996), that the whole purpose of the resentencing hearing is to correct a sentence found invalid because of inaccuracies in the information relied on at sentencing. *Id.* at 99. When the trial court scheduled the second resentencing hearing, not only was it obligated to do so, but, it did so to

ensure an accurate sentence calculation on correct information. And in the process a valid sentence was delivered.

Affirmed.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Pat M. Donofrio